

1 ROBERT G. DREHER
2 Acting Assistant Attorney General

3 KEVIN W. McARDLE, Senior Attorney (D.C. Bar No. 454569)
4 United States Department of Justice
5 Environment & Natural Resources Division
6 Wildlife & Marine Resources Section
7 Benjamin Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Tele: (202) 305-0219/Fax: (202) 305-0275
kevin.mcardle@usdoj.gov

8 AYAKO SATO, Trial Attorney
9 United States Department of Justice
10 Environment & Natural Resources Division
Natural Resources Section
11 Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Tele: (202) 305-0239/Fax: (202) 305-0506
Ayako.Sato@usdoj.gov

12
13
14 IN THE UNITED STATES DISTRICT COURT
15 FOR THE NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO DIVISION

17 CENTER FOR BIOLOGICAL DIVERSITY, *et al.*,

Case No. 3:03-cv-02509-SI

18 Plaintiffs,

**STIPULATION AND PROPOSED
ORDER REGARDING
FURTHER PROCEEDINGS**

19 v.

20 BUREAU OF LAND MANAGEMENT, *et al.*,

21 Federal Defendants,

22 and

23 AMERICAN SAND ASSOCIATION, *et al.*,

24 Defendant-Intervenors.

25
26
27
28 STIPULATION RE FURTHER PROCEEDINGS

U.S. Department of Justice
Environment & Natural Resources Division
Washington, D.C. 20044-7611
Case No. 3:03-cv-02509-SI

1 To establish an orderly schedule for accelerated further proceedings in this matter, and to
 2 avoid a dispute over preliminary injunctive relief, the parties, through undersigned counsel, and
 3 subject to the Court's approval, hereby state as follows pursuant to Civil L.R. 7-12:

4 WHEREAS, claims four through eight of Plaintiffs' Second Amended Complaint (ECF
 5 No. 147) challenged: (1) the U.S. Fish and Wildlife Service's ("Service") January 25, 2005
 6 Biological Opinion ("2005 BiOp") regarding the U.S. Bureau of Land Management's ("BLM")
 7 management of the Imperial Sand Dunes Recreation Area under the 2003 Recreation Area
 8 Management Plan ("RAMP"); (2) BLM's Environmental Impact Statement ("EIS") for the
 9 RAMP; (3) BLM's March 24, 2005 Record of Decision ("2005 ROD") approving the RAMP;
 10 and (4) the Service's August 4, 2004 final rule designating critical habitat for the Peirson's milk-
 11 vetch ("Critical Habitat Rule");

12 WHEREAS, the parties filed cross-motions for summary judgment on claims four
 13 through eight in Plaintiffs' Second Amended Complaint;

14 WHEREAS, on March 14, 2006, the Court issued an opinion and order granting in part
 15 and denying in part each party's motion for summary judgment (ECF No. 174), and finding that
 16 Federal Defendants "have failed to comply with federal environmental statutes in a number of
 17 important respects," ECF No. 174 at 3;

18 WHEREAS, the Court held that the Service's 2005 BiOp violated the Endangered
 19 Species Act by: "permit[ting] significant declines in the population of the already-threatened
 20 Peirson's milk-vetch before instituting any mitigating measures"; "fail[ing] to explain how
 21 continued and expanded habitat degradation of almost half of the designated critical habitat for
 22 the Peirson's milk-vetch does not result in 'adverse modification"'; and including an incidental
 23 take statement for the desert tortoise that "does not contain a meaningful standard by which
 24 incidental take can be measured" and "fail[ing] to include required 'terms and conditions'
 25 regarding how to minimize the potential for incidental take," ECF No. 174 at 3;

26 WHEREAS, the Court further held that the Service's decision to exclude certain areas
 27 from the Critical Habitat Rule was inadequately supported and contrary to the ESA, ECF No.
 28 174 at 3;

1 WHEREAS, the Court also held that the EIS for the 2003 RAMP violated the National
 2 Environmental Policy Act by eliminating the interim closures that have been in place since
 3 November 2000 from the range of alternatives evaluated and by failing to take a hard look at the
 4 impact of the RAMP on endemic invertebrates, ECF No. 174 at 3-4;

5 WHEREAS, on September 26, 2006, the Court issued its Order and Injunction Regarding
 6 Final Relief (ECF No. 192) ("Remedy Order");

7 WHEREAS, in relevant part, the Remedy Order: vacated and remanded the 2005 ROD
 8 and EIS; vacated and remanded portions of the 2005 BiOp and incidental take statement (with
 9 conditions); remanded the 2003 RAMP; remanded the Service's exclusions from the Critical
 10 Habitat Rule (with conditions); and directed the Service to submit a new final critical habitat rule
 11 to the Federal Register for publication no later than February 1, 2008;

12 WHEREAS, paragraphs 5-7 of the Remedy Order provide, in relevant part, as follows:

13 5. Notwithstanding any contrary provision of the 2005 ROD, 2003 RAMP, or
 14 the FEIS, BLM shall maintain the vehicle closures as identified in the "Temporary
 15 Closure of Approximately 49,300[] Acres to Motorized Vehicle Use of Five Selected
 Areas in the ISDRA," 66 Fed. Reg. 53,431-02 (Oct. 22, 2001) ("Temporary
 Closure")...

16 6. All injunctive relief shall expire 90 days after [BLM]'s issuance of a new
 17 ROD approved after the completion of appropriate levels of land-use planning,
 18 environmental analysis, and consultation pursuant to NEPA, [the Federal Land Policy
 19 and Management Act], and the ESA...

20 7. BLM and [the Service] shall provide plaintiffs and defendant-intervenors
 21 with copies of relevant final documents and file a Notice with this Court indicating that
 22 the documents have been issued. Within 90 days of the filing of the Notice, plaintiffs
 23 and defendant-intervenors may file a response, if any, to the Notice explaining why the
 24 terms of this Order should continue...

25 WHEREAS, on February 14, 2008, the Service's new critical habitat designation for the
 Peirson's milk-vetch was published in the Federal Register, 73 Fed. Reg. 8748 (Feb. 14, 2008);

26 WHEREAS, the 2008 critical habitat designation was upheld in response to legal
 27 challenges brought by the Plaintiffs in this case and others, *see Maddalena v. U.S. Fish &*
Wildlife Serv., No. 3:08-cv-02292-H-AJB (S.D. Cal. Aug. 5, 2010);

1 WHEREAS, in June 2013, BLM issued a new ROD and RAMP for the ISDRA (“2013
2 ROD”), which was preceded by BLM’s preparation of a new EIS pursuant to NEPA and the
3 completion of consultation with the Service pursuant to ESA Section 7(a)(2), which resulted in
4 the Service’s issuance of a new Biological Opinion on November 2, 2012 (“2012 BiOp”);

5 WHEREAS, on June 17, 2013, Federal Defendants filed a Notice of the issuance of the
6 ROD and supporting documents, including the new EIS and 2012 BiOp, and provided copies of
7 the documents to the Plaintiffs and Defendant-Intervenors pursuant to paragraph 7 of the
8 Remedy Order;

9 WHEREAS, Plaintiffs have indicated that they intend to file a new pleading challenging
10 the new ROD and supporting documents;

11 WHEREAS, Plaintiffs have also indicated that they intend to file a response to the Notice
12 explaining why the terms of the Remedy Order should continue and, in addition or in the
13 alternative, seek preliminary injunctive relief pending a ruling on the merits of their challenge to
14 the June 2013 ROD and supporting documents;

15 WHEREAS, the parties subsequently entered into negotiations for a procedure whereby
16 paragraph 5 of the Remedy Order would remain in effect while Plaintiffs’ challenge to the June
17 2013 ROD and supporting documents is resolved on an expeditious basis, thereby avoiding the
18 need for emergency proceedings and conserving the resources of the parties and the Court;

19 WHEREAS, BLM desires to obtain a resolution of Plaintiffs’ challenge to the June 2013
20 ROD and supporting documents as soon as possible, and in advance of April 15, 2014, to allow
21 sufficient time for implementation of the ROD and public education prior to the periods of high
22 use of the ISDRA commencing in the fall of 2014;

23 NOW, THEREFORE, the parties hereby stipulate and agree as follows:

24 1. Plaintiffs shall file a new pleading challenging the June 2013 ROD and supporting
25 documents on or before **September 16, 2013**.

26 2. Federal Defendants shall file the administrative records for the June 2013 ROD
27 and the 2012 BiOp on or before **September 20, 2013**

1 3. Federal Defendants and Defendant-Intervenors shall file their answers or other
2 responses to Plaintiffs' new pleading, if required under the Federal Rules of Civil Procedure, on
3 or before **October 15, 2013**.

4 4. Plaintiffs shall file their motion for summary judgment on or before **October 18,**
5 **2013.** Plaintiffs' supporting memorandum of points and authorities shall not exceed 25 pages.

6 5. Federal Defendants shall file a combined cross-motion for summary judgment and
7 opposition to Plaintiffs' motion, not to exceed 25 pages, on or before **November 15, 2013.**

8 6. Intervenor-Defendants shall file a combined cross-motion for summary judgment
9 and opposition to Plaintiffs' motion, not to exceed 25 pages, on or before **November 15, 2013.**

10 7. Plaintiffs shall file a single combined opposition and reply to the summary
11 judgment briefs described in paragraphs 5 and 6, not to exceed 20 pages, on or before **December**
12 **6, 2013.**

13 8. Federal Defendants shall file a reply brief, not to exceed 15 pages, on or before
14 **December 20, 2013.**

15 9. Intervenor-Defendants shall file a reply brief, not to exceed 15 pages, on or before
16 **December 20, 2013.**

17 10. Notwithstanding any contrary provision of the June 2013 ROD or supporting
18 documents, paragraph 5 of the Remedy Order shall remain in effect until the Court issues a
19 ruling on the parties' cross-motions for summary judgment or **April 15, 2014**, whichever occurs
20 first. While Paragraph 5 of the Remedy Order remains in effect, BLM shall not be required to
21 implement any provision of the June 2013 ROD or supporting documents. However, nothing in
22 this Stipulation precludes BLM, in its sole discretion, from implementing any provision of the
23 ROD or supporting documents that is not inconsistent with paragraph 5 of the Remedy Order.

24 11. Plaintiffs shall not pursue any preliminary or provisional injunctive relief
25 involving the ISDRA or the claims contained in the new pleading prior to the Court's ruling on
26 cross-motions for summary judgment or April 15, 2014, whichever occurs first.

1 12. The parties respectfully request that the Court issue a ruling on the parties' cross-
2 motions for summary judgment as soon as possible after briefing is complete and in advance of
3 April 15, 2014, if possible.

4 DATED: August 2, 2013

Respectfully submitted,

5 **ROBERT G. DREHER**
6 Acting Assistant Attorney General

7 */s/ Brendan R. Cummings*
8 (with permission by Kevin W. McArdle)
9 Brendan R. Cummings
10 Center for Biological Diversity
11 P.O. Box 549
12 Joshua Tree, CA 92252
13 760-366-2232
14 Fax: 760-366-2669
15 bcummings@biologicaldiversity.org

16 */s/ Kevin W. McArdle*
17 KEVIN W. McARDLE, Trial Attorney
18 United States Department of Justice
19 Environment & Natural Resources Division
20 Wildlife & Marine Resources Section
21 Benjamin Franklin Station, P.O. Box 7611
22 Washington, D.C. 20044-7611
23 Tele: (202) 305-0219/Fax: (202) 305-0275
24 kevin.mcardle@usdoj.gov
25 Kevin.McArdle@usdoj.gov

26 */s/ Lisa T. Belenky*
27 (with permission by Kevin W. McArdle)
28 Lisa T. Belenky
1 Center for Biological Diversity
2 351 California Street , Suite 600
3 San Francisco, CA 94104
4 415-436-9682 ext. 307
5 Fax: 415-436-9683
6 lbelenky@biologicaldiversity.org

7 */s/ Ayako Sato*
8 AYAKO SATO, Trial Attorney
9 United States Department of Justice
10 Environment & Natural Resources Division
11 Natural Resources Section
12 Ben Franklin Station, P.O. Box 7611
13 Washington, D.C. 20044-7611
14 Tele: (202) 305-0239/Fax: (202) 305-0506
15 Ayako.Sato@usdoj.gov

16 Attorneys for Defendants

17 */s/ Paul A. Turcke*
18 (with permission by Kevin W. McArdle)
19 Paul A. Turcke
20 Moore Smith Buxton & Turcke
21 950 West Bannock Street, Suite 520
22 Boise, ID 83702
23 208/331-1807
24 pat@msbtlaw.com

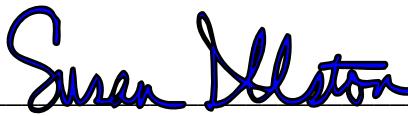
25 Attorney for Defendant-Intervenors Blue
26 Ribbon Coalition, California Association of 4
27 Wheel Drive Clubs, San Diego Off Road
28 Coalition, Desert Vipers Motorcycle Club, and

1 High Desert Multiple Use Coalition
2

3 /s/ *David P. Hubbard*
4 (with permission by *Kevin W. McArdle*)
5 David P. Hubbard , Esq.
6 Gatzke Dillon & Ballance LLP
7 1525 Faraday Avenue, Suite 150
8 Carlsbad, CA 92008
9 (760) 431-9501
10 dhubbard@gdandb.com

11
12 Attorney for Defendant-Intervenors Off-Road
13 Business Association, California Off-Road
14 Vehicle Association, and American Sand
15 Association

16 Pursuant to Stipulation, **IT IS SO ORDERED** this 5th day of August, 2013

17
18 
19 HON. SUSAN ILLSON
20 UNITED STATES DISTRICT JUDG

21 This matter has been scheduled for argument on Friday,
22 January 31, 2014, at 9:00 a.m.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28